(2) the February 1972 rent had been demanded between the 10th and 18th March.

On the basis of those findings he decided that the Notice to Quit was good in law insofar as the February 1972 (but not March 1972) rent was concerned.

It is contended in this appeal that the learned Magistrate was wrong in finding that the February 1972 rent was due on 10th March 1972. In this connection the learned Magistrate in his Grounds of Judgment said:

"The fact that the plaintiff occasionally indulged the defendant in accepting the rent 2 months late does not mean that it should be regarded as evidencing a practice amounting to a variation of the agreed term as to the date of payment (as per *Bui Din Lan* v. *Sim Kim Eng* [1951] M.L.J. 156).

Allowing that some laxity was exercised in favour of the defendant in view of his friendly relations with the plaintiff at the outset, I make a finding of fact that the date the rent becomes due is the *tenth* day of the month following the month for which the rent is claimed for example for February, the date of payment would be the 10th March."

The learned Magistrate's finding that the due date was the 10th of the following month merely because some laxity should be allowed in view of the parties' friendly relations is purely arbitrary and unreasonable and as there was no agreement at all in respect thereof he should have found, as contended by the respondent, that the due date was the 1st of the following month, *i.e.* 1st March 1972 for the February 1972 rent. In *Hill and Redman's Law of Landlord and Tenant*, 15th Edition, at page 333 it is stated as follows:

"204. When and by whom rent is payable. — The reddendum fixes the periods when the rent is to be paid. If no periods are fixed, a rent reserved generally will be payable yearly, when the tenancy is for a term of years certain, and *at the end of each period of a periodic tenancy.*" (My italics).

The learned Magistrate's erroneous finding on this however could not upset his decision as a whole.

Another ground of appeal is that the learned Magistrate was wrong in finding that demand for the February rent was made between the 10th and 18th of March 1972 without giving any reason whatsoever for so finding. It is submitted by counsel for the respondent that since demand had not been specifically raised as an issue in the Statement of Defence it cannot be raised in this appeal. I do not agree. Paragraph 3 of the Statement of Claim averred that the appellant was in arrears of rents for two months and as paragraph 2 of the Statement of Defence had denied this and paragraph 3 thereof had averred that the rents were not lawfully in arrears and that the Notice to Quit was bad in law it was in my view incumbent upon the respondent to establish that the rents were lawfully in arrears and that the Notice to Quit was good in law.

In this connection the learned Magistrate in his Grounds of Judgment said:

"What is the position regarding the February rent? It became due on 10th March. Any demand made between 10th March, i.e. the due date, and 18th March, i.e. 14 days prior to the date of the Notice to Quit, would be a good demand for the purpose of serving a notice to quit.

Was such a demand made?

Bearing in mind that the plaintiff and the defendant are next door neighbours, I find, on a balance of probabilities, that such a demand *was* made."

The respondent had said that sometimes the appellant was even two months late in payment of the monthly rent and as the Notice to Quit dated 4th April 1972 was issued in respect of both February and March 1972 rents I consider it improbable that any demand was made at all in March for February 1972 rent. Even assuming that demands had been made there is no evidence to show that they had been made during the period specified by the learned Magistrate. The respondent himself had not said when he made those demands in March 1972. Apparently the learned Magistrate had arbitrarily fixed that period merely because he had found that the 10th was the due date and that the 18th was 14 days prior to the date of the Notice to Quit. What is more damaging to the respondent's case is that in his evidence he had said that he made those demands, not at the premises, but at the appellant's adjoining medicine shop No. 5A. As is shown in the judgments of Rigby J. in *Penang Motors (1950) Ltd.* v. *Suah Motors*[1] and Spenser Wilkinson J. in *Chop Lean Yak* v. *Ng Ah Hee*[2] such demand must be made not only 14 days or more before the date of the service of the Notice to Quit but must also be made at the premises before the rent could be said to be lawfully in arrear — unless of course there is an agreement for the payment of the rent elsewhere. There was no such agreement in this case. The learned Magistrate was therefore wrong in deciding that the Notice to Quit was good in law.

In the event I would allow this appeal with costs here and in the court below. The orders made by the learned Magistrate are set aside.

Appeal allowed.

Solicitors: *Elyas Majeed & Co.; Tay Leong Siak & Co.*

SUTHON KAVSONTHI v. PUBLIC PROSECUTOR

[A.Cr.J. (Ibrahim J.) August 30, 1974]
[Malacca — Criminal Appeal No. 3 of 1974]

Customs and Excise — Charge of importing prohibited goods — Whether necessary to prove knowledge that goods are prohibited — Mens rea — Customs Act, 1967, ss. 2, 45, 135.

The appellant had been convicted of the offence of importing prohibited goods to wit rice. The goods were found on a vessel which had arrived at the Port of Melaka. In his defence the appellant had alleged that the rice was *bona fide* in transit and that he did not know that a licence was required for bringing it into the Federation. The learned President of the Sessions Court rejected the plea that the goods were in transit and also held that "knowledge" was not relevant to the offence under section 135 of the Customs Act.

Held: (1) on the facts the learned President was justified in holding that the goods were not *bona fide* in transit;

(2) the learned President was wrong in holding that guilty knowledge was not relevant but on the facts before him the learned President would not have accepted on a balance of probabilities the appellant's story that he did not know that a licence was required for bringing the rice into the Federation, therefore the appeal must be dismissed.

Cases referred to:-

(1) *Pang Po & Anor.* v. *Public Prosecutor* [1962] M.L.J. 294, 295.

(2) *Ng Eng Kooi & Anor.* v. *Public Prosecutor* [1970] 1 M.L.J. 267.

(3) *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918.

CRIMINAL APPEAL.

F. H. D'Cruz for the appellant.

Murad bin Sheikh Ismail (Deputy Public Prosecutor) for the respondent.

Ibrahim J.: This is an appeal against the order of the learned President, Malacca who on 26th March 1974 convicted and fined the appellant in the sum of $7,400 in default 12 months' imprisonment on the following charge:

"That you on 16.1.1974 at about 3.30 a.m. in the Port of Melaka, in the district of Melaka Tengah, in the State of Melaka, were concerned in the importing of prohibited goods, to wit: 9 bags of rice weighing 1,472 katis and valued at $736.00 on the vessel M. S. 'Samut Songkhram', such goods being goods the import of which is prohibited except under and by virtue of an import licence issued by the Comptroller-General under the Customs (Prohibition of Imports) Order, 1969 (PU (A) 426/69) and thereby committed an offence under section 135(1)(a) and punishable under section 135(1)(iii) of the Customs Act, 1967."

The vessel M.S. 'Samut Songkhram' arrived at the Port of Melaka at about 3.30 a.m. on 16th January 1974 and the port clearance for her departure within 48 hours had already been issued on the morning of 18th January 1974 when at about 9.40 a.m. the 9 bags of rice were discovered in a store-room in her forecastle by a Customs party led by the Superintendent of Customs (PW4). It was not disputed that rice had since 1969 become "prohibited goods" in the sense that its import was prohibited without a licence and as the appellant had admitted to PW4 that the rice was his and that he had brought it from Bangkok it cannot be denied that he was concerned in bringing it into the Federation. In his defence the appellant alleged that the rice was *bona fide* "in transit" in the sense that it was brought into the Federation for the sole purpose of being carried to another country and that he did not know that a licence was required for bringing it into the Federation.

The expressions "prohibited goods" and "in transit" referred to above and "import" and "uncustomed goods" which would subsequently be referred to in this judgment are defined in section 2 of the Customs Act, 1967.

In connection with the first line of defence the learned President in his grounds of judgment said:

"As to the first point of the learned Defence Counsel's submission, I find that the defence story is not consistent with innocence. The accused in his defence said that the 9 bags of rice were for his own consumption and also to be given to his friends in Singapore. This piece of testimony cannot be believed, firstly because in his own evidence accused said that the ship provided the crew with meals and so there was no necessity for him to have such a huge quantity of rice for his extra meals during the journey. Secondly the accused could not have given the rice to his friends in Singapore as it is clear from P6, a document prepared by the master of the ship and signed in the presence of PW 3, that the next port of call is not Singapore but back to Bangkok."

I see no reason why I should interfere with this finding of fact by the learned President.

It has been argued at some length as to whether the proviso to the definition of "import" is applicable in this case and though it would not affect the learned President's decision I consider it appropriate to deal with it. The learned Deputy Public Prosecutor has submitted that as the rice was not "*bona fide* ship's stores" and had not been "accounted for in the manifest or other documents which ought to be aboard such vessel" a breach of section 45 of the Customs Act, 1967 had been committed and the rice had therefore become "uncustomed goods". He has further submitted that as the presumption under the said section 45 is an irrebuttable presumption as pointed out by Suffian J. (as he then was) in *Pang Po & Anor.* v. *Public Prosecutor*,[1] the appellant was precluded from adducing evidence that the rice was *bona fide* "in transit". I do not agree with him because as stated therein the proviso to the definition of "import" is applicable only "for the purpose of levy of customs duties." In this case we are concerned not with that but with import of "prohibited goods."

In connection with the second line of defence the learned President in his Grounds of Judgment said:

"As regards the third point in the Defence Counsel's submission I must disagree with his contention that the burden on the accused is to show that he had no knowledge that the rice was uncustomed or even prohibited goods. In both cases he referred to the word 'knowingly' was present in the section of the law creating the offence, whereas under section 135(1)(a) that word is not inserted and therefore knowledge is not relevant to the offence under the section."

Section 135(1) of the Customs Act, 1967 lays down 7 types of offences of which only in 3, *i.e.* (d) (e) & (g) the word "knowingly" appears and section 135(2) provides that:

"In any prosecution under this section or section 139 any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant."

In support of the learned President's decision that the said section 135(2) was not applicable and that therefore guilty knowledge was not relevant in this case which is under (a) the learned Deputy Public Prosecutor has submitted that in view of the omission of the word "knowingly" an absolute offence has been created thereby in the sense that it is not criminal in nature but is an act which in the public interest is prohibited under a penalty. Again I do not agree with him. If that was the intention of the legislature it would not have been difficult to specifically say so in the said section 135(2). As it is it refers to "any prosecution under this section or section 139." In my view "knowingly" wherever it appears in the said section 135(1) refers to an accused person's knowledge of the act which he is alleged in the charge to have committed whereas "knowledge" in the said section 135(2) refers to his knowledge that the goods in respect of which he is charged are dutiable, uncustomed or prohibited goods as the case may be. Support for my view could be found in *Ng Eng Kooi & Anor.* v. *Public Prosecutor*[2] where Azmi L.P. at page 268 said:

"We would pause here to observe that the prosecution had to prove three things against each of the accused:

(1) that he was knowingly concerned in conveying a quantity of rice;

(2) that the rice was prohibited goods in the sense alleged in the charge, that is, that it had been imported without a licence; and

(3) that he knew that the rice was prohibited goods in the sense charged, that is, that it was imported rice and that its import was not covered by a licence."

The charge in that case was one under section 131(1)(e) of the Customs Ordinance 1952 (which has since been replaced by section 135(1)(e) of the Customs Act, 1967) where the word "knowingly" appears but it is obvious from the judgment that Azmi L.P. had also dealt with the effect of section 131(2) (which has since been replaced by the present section 135(2)).

Again in *Sherras* v. *De Rutzen*[3] which was an appeal against conviction under section 16(2) of the Licensing Act, 1892 for having unlawfully supplied liquor to a police constable on duty without having the authority of a superior for so doing Day J. in allowing the appeal at page 921 said:

"An argument has been based on the appearance of the word 'knowingly' in sub-section 1 of section 16, and its omission in sub-section 2. In my opinion the only effect of this is to shift the burden of proof. In cases under sub-section 1 it is for the prosecution to prove the knowledge, while in cases under sub-section 2 the defendant has to prove that he did not know. That is the only inference I draw from the insertion of the word 'knowingly' in the one sub-section and its omission in the other."

It may be noted here that by virtue of the said section 135(2) even in cases under (d) (e) and (g) the burden of proof has been shifted to the defence but as stated by Azmi L.P. at page 271 in the same case referred to earlier the quantum of proof is "proof on the balance of probabilities as in civil proceedings."

The learned President had therefore erred in finding that guilty knowledge was not relevant. It is unfortunate that he had not considered the appellant's second line of defence as there was evidence adduced by both sides from which he could have made a decision. After considering the circumstances of the case I am of the view that this is not a proper case where a new trial should be ordered. As the appellant is a foreigner and has been in custody from 18th January 1974 when he was arrested till 26th March 1974 when he was convicted and has been serving his imprisonment since that date and as a new trial would necessarily involve further delay it would not, in my view, be in the interests of justice to make such an order.

I would therefore proceed to review the evidence on record and decide the appeal on its merits as has been urged upon me by both counsel for the appellant and the learned Deputy Public Prosecutor. The appellant had said not only that he did not know that a licence was required for bringing in the rice but also that on his previous visit when he also brought some rice no responsible officer of the vessel had asked him to fill in any form for the purpose of getting a licence or for any other purpose. Guilty knowledge can be inferred from the surrounding circumstances of a case and it has been submitted by the learned Deputy Public Prosecutor that since the import of rice into this country without a licence had been prohibited many years before the alleged offence was committed and as the appellant who came from neighbouring Thailand had been to this country before it was highly improbable that he had not known it. There is also evidence given by PW4 that though all the crew present had remained silent when he asked them who was the person in charge of the store the appellant had gone to the storeroom and unlocked it soon after PW 4 had walked away from it and it is further submitted by the learned Deputy Public Prosecutor that the appellant's conduct would show that he had guilty knowledge. I am inclined to agree with the learned Deputy Public Prosecutor and since the learned President had not accepted the appellant's story that the rice was *bona fide* "in transit" I am of the view that had he considered the evidence before him he would not also have accepted, on a balance of probabilities, the appellant's story that he did not know that a licence was required for bringing (*i.e.* importing) the rice into the Federation.

I would therefore dismiss the appeal and confirm the conviction. As in my view the 12 months' imprisonment in default of payment of the fine is in the circumstances of this case manifestly excessive I would reduce it to six months.

Appeal dismissed.

Solicitors: *Tay Leong Siak & Co.*

WOO YOK WAN v. LOO PEK CHEE

[O.C.J. (Ajaib Singh J.) September 17, 1974]
[Seremban — Civil Suit No. 127 of 1974]

Land Law — Tenancy agreement for twelve years relating to ground floor of premises — Notice issued terminating tenancy — Proprietor making agreement to sell premises — Tenant lodging private caveat and commencing action for specific performance of tenancy agreement — Proprietor applying by summons-in-chambers for removal of caveat — Whether tenant has registrable interest and can enter caveat — Whether caveat valid — Whether equitable principles applicable in Malaysia — Civil Law Act, 1956, s. 6 — National Land Code, ss. 323(1)(a), 323(2).

Practice and Procedure — Application for removal of caveat — Whether can be brought by summons-in-chambers in pending suit.

The defendant was the registered proprietor of land, on which stood a double-storey shophouse. The defendant had entered into a tenancy agreement with the plaintiff whereby the defendant let out the front portion of the ground floor and a room at the rear of the shophouse to the plaintiff. Action having been taken by the Seremban Town Council for the closing down of the premises on the ground that the building was in a dangerous condition the defendant served a notice to quit to the plaintiff. The defendant also entered into an agreement for the sale of the shophouse. The plaintiff lodged a private caveat in respect of the whole of the land and filed a writ in effect asking for specific performance of the tenancy agreement. The defendant applied by summons-in-chambers in the suit to have the caveat removed.

Held: (1) where there was a pending action in court relating to the lands which were the subject matter of the caveat, an application for the removal of the caveat can be made by summons-in-chambers in the suit;

(2) in this case equity would treat the agreement as an agreement for a lease and specifically enforce it and therefore the plaintiff had a registrable interest within the meaning of section 323(1)(a) of the National Land Code in respect of the portion of the land let out to her; and she was entitled to lodge a caveat against that portion of the land;

(3) as the caveat in this case was lodged against the whole of the land and as the plaintiff's claim was restricted to only a portion of the land, the caveat was bad and should be removed.

Cases referred to:-

(1) *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1969] 1 M.L.J. 232.

(2) *Tee Chin Yong* v. *Ernest Jeff* [1963] M.L.J. 118.

(3) *Chi Liung & Sons Sdn. Bhd.* v. *Chong Fah & Sons Sdn. Bhd. & Anor.* [1974] 2 M.L.J. 211.